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William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-46

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, I submit this original and one copy of a letter disclosing an oral ex parte presentation in the above-referenced proceeding.

On May 24, 1996, the undersigned, Frederick E. Ellrod III, and Kevin McCarty of the United States Conference of Mayors, on behalf of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, met with Lauren J. Belvin of Commissioner Quello's staff. The meeting dealt with issues regarding local communities' authority over their public rights-of-way, PEG access requirements for open video systems, and open video system operation by cable operators,

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including matters set forth in the attached memoranda, which were given to Ms. Belvin at the meeting.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By

Tillman L. Lay

cc: Lauren J. Belvin

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TO: Federal Communications Commission

FROM: National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

DATE: April 26, 1996

RE: **Open Video Systems (CS Docket No. 96-46): Right-of-Way Issues**

I. INTRODUCTION

Open video system ("OVS") rules must acknowledge local governments' property interests in the public rights-of-way. Any OVS regulations promulgated by the Commission that allow OVS providers to place OVS systems in local rights-of-way without regard to local governments' property interests in those rights-of-way would merely embroil local governments, OVS providers and the federal government in complex, lengthy Fifth Amendment litigation and thereby delay indefinitely the implementation of OVS, contrary to the statute's objectives.

In their reply comments in this docket, local exchange carriers ("LECs") appear to acknowledge that such an intrusion into the public rights-of-way would be a taking, and then proceed to encourage the Commission to issue rules that would purport to justify such a taking. (This should not be surprising, since compensation for the taking would come out of federal taxpayers' pockets rather than the LECs'.) This memorandum responds to the arguments raised by the LEC reply comments on this issue.

II. THE 1996 TELECOMMUNICATIONS ACT DOES NOT ELIMINATE LOCAL COMMUNITY CONTROL OVER THE PUBLIC RIGHTS-OF-WAY.

Some LECs seek to argue that the OVS provisions contained in the 1996 Act preclude state and local governments from managing and requiring fair compensation for the use of their public rights-of-way.[1] These arguments wilt under scrutiny.

A. The 1996 Act Does Not Exempt OVS Operators from Franchise Requirements Other Than the Title VI Franchise Requirement.

Bell Atlantic et al. allege that the OVS statutory provisions represent an "explicit" preemption of all franchise requirements.[2] This is incorrect. Section 653(c) merely exempts

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[1] See, e.g., Reply Comments of Bell Atlantic et al. at 34.

[2] Reply Comments of Bell Atlantic et al. at 30, 33-34. See also U S West, Inc. Reply Comments at 12; Reply Comments of the United States Telephone Association at 6.

an OVS from Section 621 — the federal law requirement that a cable operator may not provide cable service without a "franchise" as defined in Title VI. Exempting OVS from the Title VI requirement of a local cable franchise has no effect whatsoever on any requirement under state or local law for right-of-way authorization, whether or not denominated a "franchise," and whether or not related to cable television.

Title VI did not create local communities' franchising authority. Such communities were granting franchises, including cable franchises, long before Title VI was enacted. Their authority is derived from their property interests under state and local law.[3] Title VI merely added a new federal law franchising requirement. Moreover, Title VI never purported to deprive any community of the right to franchise the use of its public rights-of-way, whether for cable, telephone, street railways, or any other use of local streets. Bell Atlantic et

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[3] Thus Bell Atlantic et al. miss the point when they argue that the Fifth Amendment does not give local communities their property rights. Reply Comments of Bell Atlantic et al. at 31. The Fifth Amendment merely protects pre-existing property rights. Similarly, the St. Louis case does not need to cite the Fifth Amendment specifically when it holds that a city has a right to charge a utility for use of the public rights-of-way. Reply Comments of Bell Atlantic et al. at 32 n.85.

In this connection, Bell Atlantic et al. apply a peculiar double standard when, on the one hand, they argue that the Supreme Court's St. Louis decision that has stood for over a century is "far from clear," id. at 32 n.85, while claiming on the other hand that there is "express" and "explicit" authorization in the Act for a taking, even though no such language can be found.

al. are thus asking the Commission to venture onto entirely new and treacherous legal ground in the OVS rules by supposing that an exemption from the federal franchising requirement may be bootstrapped into a far broader preemption of all state and local law franchising requirements.[4]

An example will illustrate the point. The § 621 cable franchise requirement surely does not apply to taxicab companies. But no one would seriously suggest that taxicab companies' effective exemption from the reach of § 621 somehow preempts the Los Angeles City charter requirement that taxicab companies must obtain a City franchise.

NYNEX manages to take both sides of this argument on a single page. NYNEX first correctly asserts that nothing in the 1996 Act or its legislative history indicates that Congress intended to preempt local governments' rights to control the use of local rights-of-way or to obtain reasonable compensation for their use. Then, in the following paragraph, NYNEX argues that local governments must not be permitted to impose "franchise-type" requirements on OVS. NYNEX Reply Comments at 17. These positions, however, are inconsistent. A "franchise" is the

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[4] For the same reasons, the LECs' attempt to dodge the Bell Atlantic collocation case, Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is fruitless. Reply Comments of Bell Atlantic et al. at 34 n.93. The franchise requirement of the Cable Act, from which an OVS operator is exempted, is distinct from any other franchise requirements that may obtain under state and local law, about which the statute is silent.

mechanism through which a local government controls and receives compensation for use of its rights-of-way. Indeed, outside the cable-specific context of the Title VI "franchise" definition, a "franchise" is more generally defined as a negotiated long-term contract between a private enterprise and a governmental entity for the use of public property.[5]

Thus, any attempt to restrict a local government's general franchising authority (as distinct from the cable franchise requirement of Title VI) would effectively usurp the local government's rights to control these rights-of-way and would effect a taking under the Fifth Amendment.

B. Sections 253 and 653 Do Not Usurp Local Authority to Control the Public Rights-of-Way.

No matter how often they repeat the phrases "express" and "explicit," Bell Atlantic et al. can find no trace, explicit or otherwise, of any congressional desire to effect a taking of

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[5] See, e.g., Santa Barbara County Taxpayers' Ass'n v. Board of Supervisors, 209 Cal. App. 3d 940, 949, 257 Cal. Rptr. 615, 620 (1989).

local public property.[6] The statute simply does not say any such thing.

In an attempt to bridge this gap, Bell Atlantic et al. construct an argument that Sections 253 and 653 of the Act, in combination, should be read to make up for this lack of express statutory authority. They fail, however, to read the language of those Sections carefully. In fact, the language of Section 253(c) and (d) merely confirms Congress' explicit desire not to intrude on local government authority over local public rights-of-way, and its instruction that the Commission not preempt such authority.

1. Section 253(c) Affirms Local Government Authority Both to Manage, And to Obtain Compensation For, Public Rights-of-Way.

Bell Atlantic et al. cite § 253(c) for the proposition that the 1996 Act "limits local governments to a managerial role over rights-of-way."[7] But on its face, Section 253(c) explicitly

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[6] See, e.g., Reply Comments of Bell Atlantic et al. at 30, 31, 33, 34, 35. Thus, there is no logical connection between Bell Atlantic's statement that Congress has the power "to pass a law instructing the FCC to authorize OVS operators to use public rights-of-way in exchange for a compensatory fee," and the claim that Congress has actually done so ("Congress has already considered and decided this issue"). Reply Comments of Bell Atlantic et al. at 29.

[7] Reply Comments of Bell Atlantic et al. at 30 & n.78.

recognizes local governments' right both to manage the rights-of-way and to receive fair compensation for their use.

> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.—Nothing in this section affects the authority or a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[8]

2. Section 253(d) Deprives the FCC of Authority to Preempt Local Government Compensation and Management Authority Over Public Rights-of-Way.

Bell Atlantic et al. proceed to claim that "the Act gives the FCC an express right to 'preempt' local regulations that exceed a purely managerial function."[9] But Section 253(d), on which Bell Atlantic relies, actually makes clear that the Commission's preemption authority does not extend to right-of-way compensation issues under Section 253(c):

> If, after notice and an opportunity for public comment, the Commission determines that a state or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.[10]

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[8] 1996 Act, Section 101(a) (adding § 253(c)) (emphasis added).

[9] Reply Comments of Bell Atlantic et al. at 30.

[10] 1996 Act, Section 101(a) (adding new § 253(d)) (emphasis added).

Thus, Section 253(d) only gives the FCC authority to preempt state or local requirements that violate Section 253(a) or Section 253(b) of the Act.[11] The FCC has no authority to preempt local requirements that might violate Section 253(c). Section 253(c) provides that "[n]othing in this section" — that is, § 253 as a whole, including the Commission's preemption authority in § 253(d) — affects local governments' control of the public rights-of-way. Thus, the Commission has no authority to preempt any state or local law or regulation based on a state or local government's authority to manage the public rights-of-way or to receive fair and reasonable compensation for their use, on a competitively neutral and nondiscriminatory basis. Disputes as to whether a particular local requirement falls within Section 253(c) are left to the courts, not the Commission.

3. Section 653 Does Not Exempt OVS Applicants From Their Obligation to Obtain Authorization to Use the Public Rights-of-Way.

Finally, Bell Atlantic et al. recite once again their claim that the statutory ten-day time limit on Commission approval of OVS certifications somehow excuses LECs from submitting a

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[11] Section 253(a) states that no state or local statute or regulation may prohibit an entity from providing telecommunications services. Section 253(b) provides that a state may impose certain requirements on a competitively neutral basis.

complete and comprehensive certification.[12] As shown in our comments, the reverse is true: the exceedingly short time allowed the Commission to evaluate a certification means that a LEC's certification must be thorough and complete to begin with. Nothing in Section 653 remotely suggests that the ten-day time limit was intended to prevent local governments from managing and obtaining compensation for the use of their public rights-of-way.

C. The OVS Provision Does Not Purport to Occupy an Entire Field of Regulation.

NYNEX acknowledges in its reply comments that "[n]othing in the Act or its legislative history indicates that Congress intended to preempt" the right of local governments to control their rights-of-way or obtain "reasonable compensation for their use."[13] At the same time, NYNEX argues that Congress intended to "'occupy the field' of open video regulation, leaving no room for state and local governments to supplement the regulatory scheme."[14] NYNEX cannot reasonably advance such a self-contradictory interpretation. Nor does NYNEX produce any support for its claim that Congress intended to exclude all other laws relating to OVS. In fact, it is clear from the OVS provision and

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[12] Reply Comments of Bell Atlantic et al. at 31 & n.81.

[13] NYNEX Reply Comments at 17.

[14] Id.

the Act as a whole (for example, the PEG provisions of § 653) that local governments retain an essential role with regard to OVS, as demonstrated in our comments.

III. ANY INTERPRETATION OF THE 1996 ACT THAT USURPS LOCAL CONTROL OVER PUBLIC RIGHTS-OF-WAY WOULD EFFECT A TAKING UNDER THE FIFTH AMENDMENT.

Our comments show that any attempt by the LECs to parlay the OVS rules into a federal giveaway of local right-of-way would be a taking of local community property, requiring just compensation under the Fifth Amendment. The LECs do not dispute this fact. Rather, they argue that the Commission should interpret the OVS provision to require such a taking and should try to establish that the fee in lieu of franchise fees constitutes sufficient compensation.[15] Neither point will hold water.

A. The LECs' Arguments That Congress Intended to Effect a Taking Lack Statutory Support.

Curiously, Bell Atlantic et al. begin by calling the Fifth Amendment issue a "smoke screen," just before they proceed to claim that the 1996 Act explicitly authorizes a taking.[16] Evidently even the LECs acknowledge that there is fire in this smoke.

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[15] Reply Comments of Bell Atlantic et al. at 32-35.

[16] Reply Comments of Bell Atlantic et al. at 31.

Bell Atlantic et al. appear to argue first that the Act explicitly authorizes a taking because "the statutory authority for the FCC's certification of OVS is explicit in the 1996 Act."[17] It is unclear how the Act's requirement that the Commission approve or disapprove a certification of compliance with FCC rules could possibly amount to an "explicit" instruction to take local property, much less "leave the FCC no alternative but to authorize OVS operators to use right-of-way in exchange for a fee," as Bell Atlantic et al. claim.[18] On the contrary, our comments demonstrate that the certification process is perfectly consistent with local authority over rights-of-way. To the extent Bell Atlantic et al. present any argument to the contrary, it is based upon the same erroneous interpretation of §§ 253 and 653 refuted above.[19]

Having failed to show any explicit authorization for a taking, Bell Atlantic et al. argue that a taking must be imputed by necessary implication. The LECs' "necessary" implication is apparently based on a claim of "[s]ubstantial evidence" that local communities would somehow delay the advent of OVS if permitted to exercise their authority over the public rights-of-

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[17] Reply Comments of Bell Atlantic et al. at 33 (emphasis added); see also id. at 34.

[18] Reply Comments of Bell Atlantic et al. at 34 n.93 (emphasis added).

[19] See Reply Comments of Bell Atlantic et al. at 33-34.

way.[20] The only support Bell Atlantic et al. offer for this sweeping accusation against local communities is a citation to a nine-year-old article by cable operator attorneys alleging "problems of municipal abuse" that supposedly occurred prior to the 1984 Cable Act.[21] This slur against local communities is unfounded. Even if those accusations were true (and they are not), and even if such anecdotal, non-legislative evidence were sufficient to establish congressional intent to effect a taking (which it is not), it misses the point: the 1984 Cable Act itself, as well as the amendments to Section 621 in the 1992 Cable Act, were designed to protect against any such perceived potential abuse, and there is no subsequent evidence of any such abuse.

In fact, cities and counties are eager for competition. (We note, for example, that Ameritech has encountered no difficulty in obtaining competitive franchises from local governments.) But encouraging competition is not the same thing as subsidizing one potential competitor with free or discounted use of the rights-of-way.[22]

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[20] Reply Comments of Bell Atlantic et al. at 34.

[21] Reply Comments of Bell Atlantic et al. at 34 & n.92.

[22] Congress could, of course, have decided to subsidize OVS by direct grants of federal funds. Similarly, the Commission may wish to contribute funds from its own federal appropriation to encourage the growth of OVS. What neither Congress nor the Commission is free to do is to contribute local communities'

B. The LECs Misinterpret the Controlling Case Law.

The LECs' response to the judicial holdings on takings consist largely of misdirection. Thus, Bell Atlantic et al. attempt to avoid the impact of the Loretto case by insisting that Congress can take property if it pays just compensation.[23] That undisputed principle alone, of course, does not show either that Congress has authorized such a taking in the OVS provision, or that any compensation Congress decides to give is just.[24]

Similarly, in responding to the Ramirez case, Bell Atlantic et al. retreat to the claim that the OVS provision expressly authorizes a taking. Ramirez, however, shows that the fee in lieu of provision in Section 653 does not resolve the question of

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valuable resources, without compensation, to subsidize OVS.

[23] Bell Atlantic et al. claim that Loretto does not support an owner's right to grant or deny consent to an invasion of its property. Reply Comments of Bell Atlantic et al. at 32. On the contrary, the Supreme Court acknowledged in Loretto that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 438, 435 (1982).

[24] Bell Atlantic et al. dismiss most of the League's taking's arguments, claiming that the Fifth Amendment does not protect the ability of property owners to refuse consent to a taking of their property for public use. While that is true if Congress does in fact carry out a taking, the LECs misread our argument. We actually stated that "*any attempt by the federal government to take away that right of consent [the right to grant or deny consent] is subject to the Takings Clause.*" Comments at 56. The point is that taking away a property owner's right to refuse or condition consent is in fact a taking, and the Takings Clause prohibits any taking of private property interests by the federal government without the payment of just compensation.

whether there is authority to take in the first place.[25] As shown above and in our comments, the text of the Act is sufficient to demonstrate the absence of any express authorization for a taking.

C. The "Fee In Lieu Of" Provision of Section 653 Does Not Satisfy the Requirement of Just Compensation.

On the assumption that Congress intended a taking in the OVS provision (refuted above), the LECs proceed to claim that the "fee in lieu of franchise fees" specified in the Act represents just compensation. But the "fee in lieu of" language says nothing about just compensation or a taking of property. Rather, § 653 simply substitutes this fee for the franchise fee applicable to cable operators under § 622 of the Cable Act, with the apparent intent of matching the franchise fee burdens on OVS and cable competitors. Section 653 nowhere suggests in any way that the fee in lieu, in and of itself, is sufficient compensation for the OVS operator's use of the public rights-of-way.

Even if Bell Atlantic et al. were correct (and they are not) in claiming that Congress intended the fee in lieu as just

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[25] See our Comments at 57 n.73.

compensation, that would not make that compensation just.[26] The amount of just compensation due is a matter for the judiciary, not Congress, to determine.[27] Such a determination is not superseded by congressional fiat.[28] Nor will courts permit the Commission or Congress to prescribe a nominal amount as compensation for right-of-way access. Rather, an affected local government would be constitutionally entitled to compensation measured by fair market value.[29]

To the extent that such a fee falls short of what the local government receives from cable operators, it would not represent the fair market value of the local government's property

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[26] Cf. Reply Comments of Bell Atlantic et al. at 28 n.73 ("Congress has spoken on the fee issue and the Commission cannot ignore Congress' determination of what fees are appropriate"). See also NYNEX Reply Comments at 17.

[27] See, e.g., Miller v. United States, 620 F.2d 812 (Ct. Cl., 1980).

[28] If the amount provided by Congress for just compensation is less than a court deems to be the constitutional minimum, the court will look to the Tucker Act, 28 U.S.C. § 1491, to provide the necessary balance to achieve just compensation. See Blanchette v. Connecticut Greene Insurance Corps., 419 U.S. 102 (1974). The Tucker Act provides payment from the U.S. Treasury. Thus, if the Commission were to construe the Act as a taking of local government property interests, as the LECs wish, the federal Treasury would be forced to subsidize the shortfall not covered by the fee in lieu.

[29] See, e.g., United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950); Bell Atlantic, 24 F.3d at 1445 n.3.

interests.[30] It is therefore insufficient to validate any allegedly authorized taking of the local government's property rights by OVS operators under color of Commission rules.

And in fact, the fee in lieu would not be sufficient. Part of a cable operator's compensation for use of rights-of-way is outside the franchise fee — PEG facilities and equipment and system facilities and equipment, to name just a few. And of course, the LECs argue that OVS operators do not have to match those requirements. If the LECs are correct, they are merely confirming the inadequacy of the fee in lieu as just compensation.

D. LECs' Existing Authorizations to Use Local Rights-of-Way to Provide Local Telephone Service Do Not Extend to OVS.

The LECs claim that many LECs already have authority to use the rights-of-way, and that OVS falls within this authority.[31] Yet they offer no examples for the Commission's or other

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[30] As pointed out in our comments, the total compensation cable operators pay for use of the local public rights-of-way consists of both franchise fees and additional forms of compensation. Thus, payments matching cable franchise fee payments alone do not represent the full market value of the compensation that a cable operator pays to a local community. Thus, NYNEX, for example, succeeds only in confirming the inadequacy of the fee in lieu provision when it argues elsewhere that an OVS operator cannot be required to provide in-kind benefits. NYNEX Reply Comments at 17.

[31] Reply Comments of Bell Atlantic et al. at 28 n.71, 32; NYNEX Reply Comments at 18 n.39.

commenters' review. As we pointed out in our comments, it would be curious if any existing authority did cover OVS, considering that OVS was invented only in February 1996, and most telephone franchises predate that event. Nor is the Commission in any position to judge what rights may or may not have been granted in varying agreements under varying state laws.[32] Thus, the Commission cannot rule on whether existing grants cover OVS. If an OVS applicant believes that its use of the rights-of-way for OVS is authorized by a pre-existing grant, it must be up to the applicant to show this in its certification filing.[33]

2. The LECs' interpretation of the Act to effect a taking will result in additional fiscal liability for the federal government.

In light of the above, the LECs' interpretation of the Act as authorizing a taking would expose the federal government to fiscal liability under the Tucker Act, 28 U.S.C. § 1491(a), that

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[32] NYNEX concedes that telephone franchises are creatures of state law. NYNEX Reply Comments at 18 n.39. The Commission, of course, has no special competence or even jurisdiction to apply or interpret such state laws. Moreover, NYNEX is incorrect in asserting that its "telephone franchise covers the use of telephone plant to provide OVS service." Id. An OVS is a "cable television system" as that term is defined in New York state law, and under New York state law, such a system requires a franchise independent of a telephone franchise. See N.Y. Executive Law § 812(2), 819(2) (McKinney, 1996).

[33] If the LECs believe that existing right-of-way authorizations cover OVS, it is hard to understand why they object so strenuously to demonstrating that they have adequate authorizations as part of their certifications.

was neither contemplated nor authorized by Congress.[34] If the Commission were to exempt LECs from paying the true costs associated with their use and occupancy of the rights-of-way, just as they would pay for any other property, the Commission would force federal taxpayers to supply the fair market value that the Takings Clause requires. The Commission cannot impute such an intent to Congress without far clearer direction than the Act provides.

The LECs claim to fear delays in the introduction of OVS. But such delays would arise, not from recognizing local communities' rights over their public rights-of-way, but from any attempt by the Commission, despite its lack of authority under the statute, to usurp local property rights. The LECs are eager to have the Commission — and federal taxpayers — "front" for the LECs by attempting to take local property rights and defend the resulting legal challenges. The Commission should decline this dangerous invitation and follow the statute as it was written, not as the LECs wish it had been written.

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[34] See generally Hooe v. U.S., 218 U.S. 322, 329, 31 S. Ct. 85, 87.

COMPARISON OF PROPOSED OVS RULES

NATIONAL LEAGUE OF CITIES ET AL.

COMPARISON OF PROPOSED OVS RULES

NATIONAL LEAGUE OF CITIES ET AL.

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Open Access		
Ensure access to capacity for IVPPs § 653(b)(1)(B)	Open access. § 8(a)(1)	When demand exceeds capacity, operator may refuse carriage, reduce its capacity. § 6(a) nn.1, 2 Operator not required to reduce its capacity below 1/3. § 6(a) n.1
• Access to both analog and digital capacity as applicable	Open, nondiscriminatory access to capacity of both types. §§ 8(c)(1), 9(b)	
• Channel counting	PEG & must-carry channels count neither in total nor in 1/3 share. § 8(c)(2)(A) Shared channels count according to number of sharers. § 8(c)(2)(B)	PEG & must-carry channels count in total, but not in 1/3 share. § 6(b) n.2 Shared channels count in total, but not in 1/3 share. § 6(b) n.2, § 6(d) n.
• Availability of initial capacity	Capacity assigned proportionately. § 8(b)(1)	
• Subsequent availability of capacity	Operator must provide capacity in 30 days if less than 2/3 occupied by IVPPs. § 8(b)(2) Capacity rights assignable among IVPPs. § 8(e)	
• Reasonable maximum capacity requirements	No limit less than 1/3 unless IVPP demand exceeds 2/3 capacity. § 8(d)(2)	If demand exceeds capacity, neither operator nor IVPP controls more than 1/3. Operator may limit IVPPs to 1/3. § 6(b) & n.1

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Reasonable minimum capacity requirements	Single-channel and part-time capacity to be made available. § 8(d)(1)	
• Definition of IVPP	(1) Provides video programming of its own selection through carriage agreement, and (2) has no financial or business relationship with operator other than carrier-user relationship. § 2(c)	Unaffiliated. *E.g.*, § 6(b) n.1.
Ensure reasonable and nondiscriminatory terms and conditions § 653(b)(1)(A)	Nondiscrimination principle. § 9(a)	Nondiscrimination principle. § 6(a)
• Reasonable financial conditions for IVPP	Operator may impose no minimum contract term more than one month or maximum less than one year. § 8(d)(3) Operator may require two months' carriage charges in advance. § 9(g) No discrimination based on financial qualifications. § 9(g)	Operator may impose reasonable requirements for creditworthiness and financial stability. § 6(a)(1) Operator may require minimum contract periods. § 6(a)(1) n.3 Operator may require security deposits. § 6(a)(1) n.2 Operator may create classes based on creditworthiness or financial stability. § 6(a)(1) n.1
• Nondiscriminatory channel positioning § 653(b)(1)(E)(i)	No unreasonable discrimination in positioning, material provided, or identification. § 9(d)	Operator may not unreasonably discriminate in material provided, but must pass through identification. § 6(e)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Prevent discrimination in shared channels § 653(b)(1)(C)	Any channel offered by more than one VPP to be carried on shared channel. § 9(d)	Operator may carry channels offered by more than one VPP on shared channel. Operator administers channel sharing. § 6(d)
• Prevent discrimination in marketing	Operator may independently offer programming also offered by IVPPs. § 9(e)	Operator may offer all IVPP programming as well as its own. § 6(c) n.
• Prevent discrimination in technical requirements	Operator may set reasonable technical standards. § 9(h)(2) Necessary technical and similar information must be made available to VPPs. § 9(f)	Operator may require evidence of ability to meet technical standards. § 6(a)(3)
• Other reasonable conditions	Operator may require evidence of lawful access to programming, indemnification. § 9(h)(1) Operator may require timely provision of programming. § 9(h)(3)	Operator may require evidence of lawful access to programming prior to carriage agreement. § 6(a)(2) Operator may require reasonable assurances of timely provision of programming. § 6(a)(4)
Ensure reasonable and nondiscriminatory carriage rates § 653(b)(1)(A)	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 10(a)-(b)	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 6(a)
• Access to information about rates	Open pricing; carriage rates filed with FCC. § 10(d)	FCC may order discovery. § 10(j) Documents submitted in disputes may be protected as proprietary. § 10(k), (g)(5)(D)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Uniform rates	Operator must justify rate differences based on 47 U.S.C. §§ 531, 534, 535; costs of carriage; nonprofit status. § 10(e)(1) No discrimination based on content. § 10(e)(2) "Most favored nation" clause. § 10(e)(3) De minimis differences may be elected by any VPP. § 10(h)	Operator must state its reasons for any differential. § 10(g)(5)(C) Operator may impose price differences up to $.05/subscriber or 5% as de minimis without further justification. § 10(g)(5)(B)
• "Reality check" yardstick to gauge reasonableness of rates	Rates presumed *unreasonable* unless: • At least four IVPPs • At least 1/3 of capacity used by IVPPs. § 10(f)	"Safe harbor": rates conclusively presumed *reasonable* if • At least one IVPP • rates to IVPPs equivalent to those charged to affiliates for similar programming under similar circumstances. Joint Parties' May 2, 1996 letter to Cable Bureau at 2
• Correction of unreasonable rates	FCC may set rates based on cost and reasonable rate of return. § 10((g) If FCC does not act, operator must ratchet rates down by 10% increments until yardstick requirements satisfied. § 10(g)	FCC may establish rates, terms and conditions. § 10(v)(1)
• Changes in rates	Once annually, with 30 days' notice. § 10(c)	